

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-2144

To be argued by
RICHARD J. KLEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KENDALL BROWN,

Petitioner-Appellant,

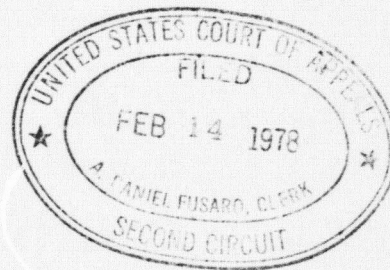
-against-

JOHN WILMOT, Superintendent of
Elmira Correction Center, and
LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

Respondents-Appellees.

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BS
Docket No. 77-2144

REPLY
BRIEF FOR APPELLANT
KENDALL BROWN



ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
KENDALL BROWN,

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-against-

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Elmira Correction Center, and
LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

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Docket No. 77-2144

REPLY
BRIEF FOR APPELLANT
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QUESTIONS PRESENTED

1. Did Kendall Brown exhaust his state remedies under 28 U.S.C. §2254(b) and (c) to properly invoke the habeas corpus jurisdiction of the district court?

2. Is a state judge's denial of bail pending appeal without stated reasons a violation of due process of law under the Eighth and Fourteenth Amendments to the United States Constitution?

ARGUMENT

Point I

KENDALL BROWN HAS EXHAUSTED
ALL STATE COURT REMEDIES (Reply).

A. State Habeas Corpus Unavailable

The Assistant Attorney General suggests that while habeas corpus under N.Y.C.P.L.R. Art. 70 does not lie to review a denial of bail pending appeal where there is no claim of a constitutional infirmity, it might be appropriate where a constitutional claim is raised. New York State case law makes no such distinction. It denies review in both instances.

In Matter of Lefkowitz v. Cioffi, 46 A.D. 2d 473 (1st Dept. 1975), a defendant at liberty on bail pending appeal had his bail revoked by the same justice who had authorized it. A writ of habeas corpus was brought before a justice of the Supreme Court. Relator claimed that the revocation of his bail pending appeal in the absence of his retained counsel violated his right to bail and effective assistance of counsel as guaranteed under the New York State Constitution.* The writ was granted and bail was set. The Office of the

*A photocopy of the portion of relator's habeas corpus memorandum containing constitutional claims which was submitted to the Supreme Court justice is exhibit "A" on page 10 of this brief. It appears in the case file at the Appellate Division, First Dept., as exhibit 2 in the Respondent Greene's verified answer to the article 78 proceeding.

Attorney General brought a proceeding pursuant to N.Y.C.P. L.R. article 78 against the judge who granted the writ of habeas corpus. The Appellate Division held that what was called a writ of habeas corpus was in fact a second application for bail pending appeal prohibited by N.Y.C.P.L. §460.50-3 (McKinney 1971) and dismissed the writ. The constitutional nature of the relator's claim made no difference to the court in ruling habeas corpus inappropriate for a review of a denial of bail pending appeal.

Under New York law, a defendant who has been convicted after trial is considered detained pursuant to a lawful conviction.* Matter of Lefkowitz v. Cioffi, supra at 475; People of the State of New York ex rel. Epton v. Nenna, 25 A.D. 2d 518 (1st Dept. 1966).

Habeas corpus does not lie after conviction unless a fundamental statutory or constitutional right is abridged. People of the State of New York ex rel. Keitt v. McMann, 18 N.Y. 2d 257, 262 (1966). There is not a single New York unreversed decision holding a denial of bail pending appeal such a fundamental statutory right that it can be reviewed by habeas corpus. People of the State of New York ex rel. Klein v. Krueger, 25 N.Y. 2d 497, 500 (1969); People of the State of New York ex rel. Epton v. Nenna, supra; Matter of Lefkowitz v. Cioffi, supra.

*It is counsel's contention that the confusion on this point led to the decision of United States ex rel. Carmona v. Ward, 416 F. Supp. 272, 275 (S.D.N.Y. 1976). Further, it does not appear that the Carmona court was aware of the unreported facts and relevance of Matter of Lefkowitz v. Cioffi, supra, as is not cited in the entire opinion.

Point II

THE STANDARD OF REVIEW APPLIED
BY THE DISTRICT COURT DOES NOT
FAIRLY RECTIFY "HUMAN ERRORS"
MADE IN EVALUATING APPLICATIONS
FOR BAIL PENDING APPEAL (Reply).

A. Brown's Appeal Non-Frivolous

Justice Werker found in his decision below that Brown's arguments about the verdict as well as the District Attorney's were non-frivolous (A,62):

"Thirdly, although petitioner Brown has asserted what may ultimately prove to be a non-frivolous ground for appeal, the district attorney also has argued non-frivolous reasons, based on the record, why he thinks the appeal will fail.*"

Where both sides as here have raised non-frivolous arguments on appeal, clearly a sufficient controversy has been raised to satisfy the requirements of N.Y.C.P.L. §510.30-2(a)(vi) & (b)**, especially where the applicant testified and still maintains his innocence.

*Brown's arguments are equally based on the record. The District Attorney's (A,37) and Brown's (A,11,14,26) arguments arise from discussion with trial counsel for each party.

**See Practice Commentary, N.Y.C.P.L. §460.50: "A reasonable possibility of reversal on appeal - comparable to a reasonable possibility of acquittal in pre-judgment situations - is merely one factor, doubtless not the most important one, to be considered on the bail application (§510.30[2b])." McKinney 1973 at 429.

B. Presumption of Regularity Unprecedented in
Non-Frivolous Appeal

Prior to Justice Werker's ruling below, it was unprecedented for a federal court reviewing a state court's denial of bail pending appeal to reject the standard that such a denial without stated reasons is arbitrary and violative of due process of law, and apply the presumption of regularity, where there was an accompanying finding that the appeal is non-frivolous. United States ex rel. Walker v. Twomey, 484 F. 2d 874, 876-7 (7th Cir. 1973) (per curiam); Natal v. People of Puerto Rico, 424 F. Supp. 1082, (D.P.R. 1975); United States ex rel. Kane v. Bensinger, 359 F. Supp. 181 (N.D. Ill., E.D. 1972).

In Abbot v. Laurie, 422 F. Supp. 976, 979 (D.R.I. 1976), petitioners succeeded in obtaining bail after a ten year sentence on a jury conviction of rape and kidnapping. The court there suggested that this Court (2d Cir.) by virtue of its action in United States ex rel. Abate v. Malcolm, 397 F. Supp. 715 (E.D.N.Y. 1975), vacated, 522 F. 2d 826 (2d Cir. 1975), has already held by implication that a denial of bail pending appeal without stated reasons is arbitrary and violates due process, where the appeal is non-frivolous:

"The court upheld Judge Pratt's ruling, holding (by implication) that the denial of post-conviction bail is arbitrary, and violates due process, where the appeal is non-frivolous."

Abbot v. Laurie, supra 979.

C. Presumption of Regularity Unprecedented Where
State Permits Only One Unreviewable Application

Prior to Justice Werker's ruling below, it was unprecedented for a federal court reviewing a state court's denial of bail pending appeal to reject the standard that such a denial without stated reasons is arbitrary and violative of due process of law, and apply the presumption of regularity to a state judge's decision, where the applicant was entitled by state law to only one unreviewable application within the state court system. United States ex rel. Walker v. Twomey, supra; Natal v. People of Puerto Rico, supra.

All three individuals in the two cases cited above, where the presumption of regularity was applied, were entitled to, and in fact made more than one application within the state court system.* These jurisdictions provided a correcting mechanism within its own court system for any error that might occur. It is the availability of a second application, or appellate review of an original determination, that supports and lends credibility to the presumption of regularity.

*United States ex rel. Walker v. Twomey, supra, was a joint appeal including United States ex rel. Kane v. Bensinger, supra. The facts of Walker's multiple bail applications while not appearing in the Seventh Circuit opinion are taken from Walker's reply brief in the Seventh Circuit.

While the Sixth and Tenth Circuits have said that they do not sit as appellate tribunals reviewing discretionary granting or withholding of bail pending appeal by state courts, both the cases in which this dicta was offered were cases where the applicants for bail pending appeal were entitled under state law to more than one unreviewable application. Bloss v. Michigan, 421 F. 2d 903,906 (6th Cir. 1970); Hamilton v. New Mexico, 479 F. 2d 343,344 (10th Cir. 1973).

It is New York State's intentional lack of review of an alleged error in bail pending appeal that should weigh heavily upon this Court to mandate a statement of reasons as required by minimal due process in New York for the denial of such an application.*

D. The Flaw of the Applied Standard

An application for bail pending appeal is entitled to be fairly decided on its merits. United States ex rel. Cameron v. New York, 383 F. Supp. 182, 184 (E.D.N.Y. 1974). Under Justice Werker's standard of review, only some misjudged applicants, entitled to bail pending appeal as a matter of law, would get relief. Without stated reasons, all the applicants who deserved bail pending appeal as an exercise of sound judicial discretion, once misjudged are

*Puerto Rico by virtue of Perez Aldarondo v. Superior Court, 102 D.P.R. 1 (1974), now requires the sentencing court to give written reasons for a denial of post-conviction bail.

forever deprived because the discretion that should have been exercised in their favor now operates on review to justify human error.

If this Court, in the absence of reasons, requires Kendall Brown to prove that no rational reason existed, and accepts Justice Werker's reasons as valid, it will eliminate review of any errors in denial of bail pending appeal in all New York robbery cases unless the applicant can guarantee reversal on appeal. This is in conflict with the provisions of N.Y.C.P.L. §510.30-2(a)(vi) & (b) (McKinney 1971).

E. Balancing Competing Standards

Conspicuous by its absence from the respondent's brief is any consideration of an appropriate test to evaluate the two competing standards for review of a denial of bail pending appeal without stated reasons (Appellant's brief, pages 10-11).

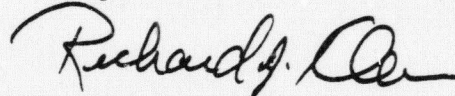
This Court should use the balancing test suggested by Goldberg v. Kelly, 397 U.S. 244, 262-3 (1970), to determine the quantum of procedural due process required in New York's denial of bail pending appeal. The test may explain why the rule of United States ex rel. Walker v. Twomey, supra, is now the law only in the Seventh Circuit*.

*Only two of the three states within the Seventh Circuit are actually affected by the rule. In Indiana, bail pending appeal must be granted as a matter of right except for sentences of death, life imprisonment, and some youths under eighteen. It is never a matter of discretion. Burns Indiana Statutes Annotated Code Edition §35-4-6-1.

CONCLUSION

Kendall Brown has been denied bail pending appeal in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He has exhausted all his state court remedies. The Court should grant a writ of habeas corpus but stay the enforcement of the writ for fifteen days to allow the Appellate Division First Department an opportunity to hold a new bail hearing and either grant a reasonable bail, or state the reasons on the record for the denial thereof. If a hearing is held within fifteen days the writ should be dismissed.

Respectfully Submitted,



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EXHIBIT A

ARGUMENT

PETITIONER'S DETENTION IS ILLEGAL
BECAUSE THE REVOCATION OF HIS
BAIL IN THE ABSENCE OF HIS COUNSEL
CONSTITUTED A VIOLATION OF HIS
RIGHT TO BAIL AND TO THE EFFECTIVE
ASSISTANCE OF SAID COUNSEL

The rights both to bail, including bail pending appeal, and to counsel, particularly retained counsel, at any proceedings concerning bail, are both constitutionally and statutorily mandated and protected. New York State Constitution, Article 1, sections 5 and 6; Criminal Procedure Law (CPL) section 460.50. Petitioner was deprived of both of these rights when his bail pending appeal was revoked in the absence of his retained attorney.

At the time that bail pending appeal was set (April 22, 1974), petitioner was represented by retained trial counsel. Ten days later he retained the services of appellate counsel. As of July 19, 1974, the date of petitioner's bail revocation, said counsel had received and accepted an assignment of \$15,000 to represent petitioner and had expended sufficient efforts on petitioner's behalf to ultimately demand a \$1500 settlement (see Exhibits A, B and C). Accordingly, petitioner had retained counsel on July 19, 1974.*

* Apparently relying on an ex parte telephone conversation with Mr. Anolik, at a prior time, that he had not yet been paid, the sentencing court decided that petitioner did not then have counsel (see minutes of
(continued on next page)

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PROOF OF SERVICE

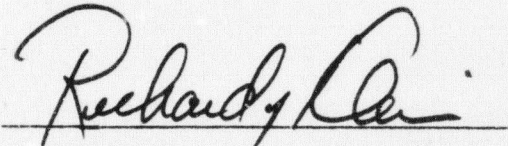
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD J. KLEIN, being duly sworn deposes and says:

1. I am the attorney for the Petitioner-Appellant
in the above entitled action.

2. On February 14, 1978, I served a reply brief
upon the Respondents in the above entitled action by mailing
two copies of Petitioner-Appellants reply brief to:

LOUIS J. LEFKOWITZ
Attorney General
State of New York
Two World Trade Center
New York, N.Y. 10047


RICHARD J. KLEIN

Sworn to before me this
14 day of February 1978

NOTARY PUBLIC

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KENDALL BROWN,

-against-

Respondents-Appellees.

Docket No. 77-2144

PROOF OF SERVICE

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